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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE QUINNINE,

Defendant and Appellant.

C086119

(Super. Ct. No. 16FE010713)

A jury convicted defendant Andre Quinnine of second degree robbery and found true allegations that he had two prior strike convictions. The trial court denied defendant's request to dismiss one of the prior strike allegations and imposed a state prison sentence of 25 years to life, plus 10 years consecutive for two prior serious felony enhancements.

In his original appellant's opening brief, defendant argued the trial court abused its discretion in declining to dismiss one of the two prior strike allegations. Then, in a supplemental brief, defendant also asked us to remand the matter to permit the trial court to exercise its new discretion pursuant to amendments created by Senate Bill No. 1393 (2017-2018 Reg. Sess.; Stats. 2018, ch. 1018, §§ 1, 2 (Senate Bill 1393)), which authorizes a trial court to dismiss a prior serious felony enhancement.

We conclude the trial court did not abuse its discretion in declining to dismiss a prior strike allegation. But we will remand the matter to permit the trial court to exercise its new discretion under Senate Bill 1393.

BACKGROUND

In 2016, defendant robbed the California Community Credit Union in Elk Grove by jumping over a counter, grabbing a teller by the neck, and forcing him to hand over cash. Defendant did not use a weapon. A jury convicted him of second degree robbery. The jury also found true allegations that he had been convicted of robbery (degree unspecified) in 1992 and of second degree robbery in 2002, and that both convictions were serious and violent felonies.

The probation report showed that the 52-year-old defendant had a felony record dating back to 1987. He was married with five adult children, but he was unemployed and had no education beyond a G.E.D. He reported a 20-year history of cocaine use ending in 2000, a two-year period of heroin use ending in 2014, and occasional use of marijuana and alcohol. He claimed dizzy spells, a bad back and arthritis, for which he did not take any medication, and a history of depression with a bipolar diagnosis for which he took daily medication.

Defendant was sentenced to two years in state prison for his 1992 conviction and to 15 years for his 2002 conviction, which punished multiple bank robberies over a seven-month span in 2001. He was on parole when he committed the instant robbery.

The probation report found as circumstances in aggravation that the present crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; the manner in which the crime was carried out indicated planning, sophistication, or professionalism; defendant had engaged in violent conduct which indicated a serious danger to society; defendant's prior convictions as an adult were numerous; defendant had served a prior prison term; defendant was on parole when the crime was committed; and defendant's prior performance on parole was unsatisfactory. The report found no circumstances in mitigation and recommended a sentence of 25 years to life, plus 10 years for the two prior serious felonies.

Defendant asked the trial court to dismiss one of his prior strike conviction allegations. (Pen. Code, § 1385;¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) He argued that his conduct in the present case was not serious enough to justify a sentence of 25 years to life plus 10 years because he did not use a weapon or any "serious" force, he took a relatively small amount of money, he did not use violence to attempt to escape or evade capture, and when arrested he surrendered without incident. The trial court denied defendant's request, explaining: "I did take a long look at [defendant]'s criminal history and what he had chosen to do in his life. And I also considered the period of incarceration and what he chose to do with his life when he got out. And I looked to see whether there was anything which would take him out of the law, which sets forth punishment for having been convicted of [three] strikes, to see whether there was anything that would cause him to be outside the scheme's spirit. That is the terminology used in the case law. And I find that there is not. [¶] I did give this matter a lot of consideration and analyzed it a number of ways, but given the nature of the

¹ Undesignated statutory references are to the Penal Code.

conduct that [defendant] chose to engage in and his repeating that kind of conduct and not learning that he can't do that, there is just nothing there.”

The trial court imposed the sentence recommended in the probation report, including the then-mandatory five-year consecutive enhancement for each of the two prior serious felony convictions. (§ 667, subd. (a).)

DISCUSSION

I

Defendant contends the trial court abused its discretion in denying his request to dismiss one of the prior strike conviction allegations. He claims his sentence is grossly disproportionate and excessive in violation of his federal constitutional right to due process.

The three strikes law “ ‘establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” ’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*)). A trial court may exercise its discretion to dismiss prior strike allegations pursuant to section 1385 if it finds that “in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)).

When a trial court declines to dismiss a prior strike allegation, we review its decision for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at pp. 374-375.) In the context of sentencing decisions, “a trial court does not abuse its discretion unless its

decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike, or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, “ ‘balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the . . . ruling, even if we might have ruled differently in the first instance.’ [citation].” (*Ibid.*)

Here, the trial court did not abuse its discretion in concluding that defendant’s background, character and prospects do not place him outside the spirit of the three strikes law. Before committing the present crime, defendant was a six-time robber who had spent a significant part of his adult life in custody or on parole. While on parole, he committed yet another bank robbery. He apparently had no employment history or marketable skills, and if he had any thoughts about changing his way of life, they were not presented in the probation report.

Defendant nevertheless claims the trial court never referenced defendant’s age or the fact he was not armed during his offenses. He argues the trial court failed to consider all relevant sentencing factors. But defendant fails to show it is arbitrary or irrational to sentence a defendant under the three strikes law merely because he is over 50, or because his multiple strike offenses are arguably less egregious than those of other offenders. He cites *People v. Bishop* (1997) 56 Cal.App.4th 1245, but that case was decided before *Williams, supra*, 17 Cal.4th 148, and *Carmony, supra*, 33 Cal.4th 367. And defendant’s assertion that the trial court must not have considered all relevant criteria because it did not address them all on the record misstates the law. “[U]nless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in . . . making any . . . discretionary sentencing choice.” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318 (*Weaver*), overruled on another ground in *People v. Cook* (2015) 60 Cal.4th 922, 935, 939.) Defendant points to nothing affirmative in the record

that shows the trial court did not consider any relevant criterion. On the contrary, the court stressed that it had considered not only defendant's criminal history, but "what he chose to do with his life" when out of custody.

Defendant cites the following authority in support of this argument: "[A]ny exercise of sentencing discretion 'must be an intensely fact-bound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration; and the record must so reflect.' ([*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968], 981-982.) Considering only a defendant's criminal history is 'incompatible with the very nature of sentencing discretion; the entire picture must remain exposed.' (*Id.* at p. 981.)" (*In re Saldana* (1997) 57 Cal.App.4th 620, 626.) But neither *Saldana* nor *Alvarez* holds that to meet these standards a trial court must address every relevant criterion expressly. Thus, they do not contradict the presumption stated in *Weaver*, *supra*, 149 Cal.App.4th at page 1318.

The trial court did not abuse its discretion in denying the request to dismiss a prior strike allegation.

II

When the trial court sentenced defendant in this case, it imposed two five-year enhancements for prior serious felony convictions. The enhancements were mandatory at the time. But Senate Bill 1393 amended section 667, subdivision (a), and section 1385, effective January 1, 2019, to grant trial courts discretion to strike or dismiss such enhancements. We agree with the parties that this change in law applies to defendant retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 (*Garcia*).)

Defendant asks us to remand the matter to permit the trial court to exercise its discretion. The Attorney General counters that remand would be futile because the trial court clearly indicated it would not have dismissed the enhancements. The Attorney General points to the trial court's comments explaining why it declined to dismiss a strike allegation, and adds that the trial court did not suggest it intended to be lenient in

sentencing. But neither point clearly confirms that the trial court would not have dismissed an enhancement. Remand is the general rule in this context, and on this record we decline to deviate from the general rule. (See, e.g., *Garcia, supra*, 28 Cal.App.5th at p. 973, fn. 3.)

DISPOSITION

Defendant's conviction and his sentence of 25 years to life are affirmed. The matter is remanded for the limited purpose of permitting the trial court to exercise its discretion regarding whether to strike or dismiss the five-year prior serious felony enhancements.

MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

/S/
ROBIE, J.